

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	DETERMINATION
<b>WINSTON AND PHYLLIS FRASER</b>	:	DTA NO. 817467
for Redetermination of a Deficiency or for Refund of New	:	
York State and New York City Personal Income Taxes	:	
under Article 22 of the Tax Law and the New York City	:	
Administrative Code for the Years 1993 through 1997.	:	

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Petitioners, Winston and Phyllis Fraser, 7 Jacobs Lane, Scotch Plains, New Jersey 07076, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 1993 through 1997.

The Division of Taxation ("Division") by its representative, Barbara G. Billet, Esq. (Christina L. Seifert, Esq., of counsel), brought a motion dated March 24, 2000, returnable April 24, 2000, for an order directing the entry of summary determination in favor of the Division on the ground that petitioners failed to file a request for a conciliation conference or a petition for a hearing before the Division of Tax Appeals within 90 days of the issuance of the Notice of Deficiency. Petitioners, appearing *pro se*, did not submit a response to the motion.

Upon review of all of the papers filed in connection with this motion, Arthur S. Bray, Administrative Law Judge, renders the following determination.

***FINDINGS OF FACT***

1. In support of its motion for summary determination, the Division submitted an affidavit of its representative along with attached exhibits. In its affidavit, the Division asserts that since petitioners did not file a request for a conciliation conference or file a petition with the Division of Tax Appeals within the 90-day period prescribed by Tax Law § 170(3-a)(a) and § 689(b), the late request for a conciliation conference was properly denied and the petition before the Division of Tax Appeals should be dismissed with prejudice for lack of jurisdiction.

2. The Division included with its affidavit a copy of its answer to the petition, dated March 2, 2000, the affidavit of Geraldine Mahon with attached exhibits, the affidavit of James Baisley, a copy of petitioners' nonresident and part-year resident return for 1997, a copy of the Conciliation Order Dismissing Request, dated September 24, 1999, a letter dated June 16, 1999, signed by Winston W. Fraser, Esq., requesting a conciliation conference, and a copy of the envelope in which the request was sent bearing a postmark of June 15, 1999.

3. As noted, the Division submitted two affidavits pertaining to the mailing of the notices. The first affidavit was that of Geraldine Mahon, a principal clerk of the Case and Resource Tracking System ("CARTS") control unit, attached to which was a copy of the certified mail record dated September 8, 1998 and 10 notices of deficiency dated September 8, 1998.

As part of her regular duties Ms. Mahon supervises the processing of notices of deficiency and determination prior to their mailing. She receives a computer printout referred to as the "certified mail record." Each of the notices is assigned a certified control number which is recorded on the certified mail record.

The certified mail record pertaining to the mailing at issue consisted of 15 fan-folded (connected) pages and included the notices of deficiency issued to Winston Fraser and Phyllis Fraser on September 8, 1998. The certified mail record has all pages connected when the document is delivered into the possession of the U.S. Postal Service. The pages remain connected until otherwise requested by Ms. Mahon. The document itself consists of 15 pages. Each of the pages has 11 entries with the exception of page 15 which has 9 entries for a total of 163 entries, and is a true and accurate copy of the certified mail record issued by the Division on September 8, 1998, including the 10 notices of deficiency issued to Winston Fraser and Phyllis Fraser on said date. In the upper left hand corner of the certified mail record, the printed date has been made illegible. This date was changed manually to "9/8/98." The original date, August 27, 1998, was the date that the certified mail record was printed, which is approximately 10 days in advance of the anticipated mailing of the notices. This procedure allows for

sufficient lead time for the notices to be manually reviewed and processed for postage, etc., by the Division's mechanical section. The handwritten change made to the date was made by personnel in the Division's Mail Processing Center so that it conforms to the actual date the notices and the certified mail record were delivered into the possession of the U.S. Postal Service.

Each statutory notice is placed in an envelope by Division personnel and then delivered into the possession of a Postal Service representative who affixes his or her initials or signature or a U.S. postmark to a page or pages of the certified mail record. In this case, the postal representative initialed the last page of the certified mail record, wrote the total number of pieces received and placed a postmark on each page.

The second page of the certified mail record indicates that 10 notices of deficiency numbered L 015522124 through L 015522133 were sent to Winston and Phyllis Fraser, 7 Jacobs Lane, Scotch Plains, NJ 07076 by certified mail using control numbers P 911 174 781 through P 911 174 790. The notice numbers and the certified control numbers correspond with those found on the notices issued to petitioners on September 8, 1998. Further, in the regular course of business and as a common practice, the Division does not request, demand or retain return receipts from certified or registered mail.

The procedures followed and described are the normal and regular procedures of the CARTS control unit.

4. The certified mail record in this case consists of 15 consecutively numbered pages wherein the certified control numbers run successively from P 911 204 769 on page 1 to P 911 174 93 on page 15.<sup>1</sup> On the final page, there is an entry for the "total pieces and amounts listed."

5. Each of the 10 notices of deficiency was dated September 8, 1998 and was addressed to Winston and Phyllis Fraser, 7 Jacobs Lane, Scotch Plains, NJ 07076. The instructions on the

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<sup>1</sup> It appears that in the process of redacting the certified mail record, the last number in the column of certified numbers was covered up.

notices stated, among other things, **"If we do not receive a response to this notice by 12/07/98:** This notice will become an assessment subject to collection action." (Emphasis in original.) The notices asserted a deficiency of New York State and New York City withholding tax as follows:

Assessment Number	Tax Article	Period Ended	Penalty	Balance Due
L 015522124	22	01/05/93 - 12/05/93	\$2089.56	\$2089.56
L 015522125	30	01/05/93 - 12/05/93	445.80	445.80
L 015522126	22	01/05/94 - 12/05/94	2089.56	2089.56
L 015522127	30	01/05/94 - 12/05/94	445.80	445.80
L 015522128	22	01/05/95 - 12/05/95	2089.56	2089.56
L 015522129	30	01/05/95 - 12/05/95	445.80	445.80
L 015522130	22	01/05/96 - 12/05/96	2089.56	2089.56
L 015522131	30	01/05/96 - 12/05/96	445.80	445.80
L 015522132	22	01/05/97 - 12/05/97	2089.56	2089.56
L 015522133	30	01/05/97 - 12/05/97	445.80	445.80

6. The affidavit of James Baisley, the Chief Mail Processing Clerk in the Division's Mail Processing Center, attests to the regular procedures followed by the Mail Processing Center in the ordinary course of its business of delivering outgoing certified mail to branches of the U.S. Postal Service ("USPS"). Statutory notices which are ready for mailing to taxpayers are received by the Mail Processing Center in an area designated for outgoing certified mail. A CMR is also received by the Mail Processing Center for each batch of statutory notices. A member of the staff operates a machine which puts each statutory notice into an envelope, weighs and seals the envelopes and places postage and fee amounts on the envelopes. A mail processing clerk checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR. The clerk then performs a random review of 30 or fewer pieces of certified mail listed on the CMR by checking those envelopes against the information contained on the CMR.

A member of the Mail Processing Center staff then delivers the sealed, stamped envelopes to one of the various branch offices of the USPS located in the Albany, New York area. A USPS employee will then affix a postmark and his or her initials or signature to the CMR indicating receipt of the mail listed on the CMR and of the CMR itself. The USPS has been requested by the Mail Processing Center to either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces on the mail record. As a matter of standard procedure, the CMR is left overnight at the USPS to enable the postal employees to process the certified mail and make the appropriate notations on the CMR. The CMR is then picked up at the USPS on the following day by a member of the Mail Processing Center staff, whereupon it is delivered to the unit from which the statutory notices originated. The CMR retrieved from the USPS is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon. The above procedures are the regular procedures followed by the Mail Processing Center in the ordinary course of business when handling items to be sent by certified mail, and these procedures were followed on September 8, 1998.

7. As noted, the Division's motion papers included a copy of the envelope which contained petitioners' Request for Conciliation Conference, a copy of the Request for Conciliation Conference and a copy of the Conciliation Order Dismissing Request. The envelope indicates that the Request for Conciliation Conference was mailed by certified mail on June 15, 1999. The Request for Conciliation Conference was dated June 16, 1999 and bore an indated stamp from the Department of Taxation and Finance of June 18, 1999.

8. Petitioners' Nonresident and Part-Year Resident Income Tax Return for the year 1997 shows the same address as that used to mail the notices of deficiency.

9. Petitioners did not offer any evidence or argument in opposition to the motion.

### ***CONCLUSIONS OF LAW***

A. A party may move for summary determination pursuant to 20 NYCRR 3000.9(b)(1) after issue has been joined. The regulation provides, in pertinent part, that:

Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the

*facts, shall recite all the material facts and show that there is no material issue of fact, and that the facts mandate a determination in the moving party's favor. The motion shall be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact (emphasis added).*

B. Here, petitioners did not respond to the Division's motion; they are therefore deemed to have conceded that no question of fact requiring a hearing exists (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325). Moreover, petitioners presented no evidence to contest the facts alleged in the Mahon and Baisley affidavits; consequently, those facts may be deemed admitted (*see, Kuehne & Nagel v. Baiden, supra*, at 544, 369 NYS2d at 671; *Whelan By Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173). Upon all of the proof presented, and pursuant to the following discussion, it is concluded that there is no material and triable issue of fact presented and that the Division is entitled to a determination in its favor.

C. Tax Law § 681(a) authorizes the Division of Taxation to issue a Notice of Deficiency to a taxpayer where the Division determines that there is a deficiency of income tax. This section further provides that such a notice "shall be mailed by certified or registered mail to the taxpayer at his last known address." In this case, the record is clear that the address listed on the subject notices was petitioners' last known address (*see*, Finding of Fact "9"). A taxpayer may file a petition with the Division of Tax Appeals seeking redetermination of the deficiency, or alternatively, a request for a conciliation conference with the Bureau of Conciliation and Mediation Services, within 90 days of the mailing of the notice of deficiency (*see*, Tax Law § 689[b]; § 170[3-a][a]).

D. Where the timeliness of either a petition filed with the Division of Tax Appeals or a request for a conciliation conference with BCMS is at issue, it is incumbent upon the Division to demonstrate that the notice at issue was properly mailed and when it was mailed (*Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991). This requires that the Division submit

evidence sufficient to prove that it has established general mailing procedures and that those procedures were followed in this instance (*Matter of Katz, supra*; *Matter of Novar TV & Air Conditioner Sales & Serv., supra*). If the Division is able to meet its burden to prove that it has general mailing procedures and that the procedures were followed, a presumption of proper mailing arises (*MacLean v. Procaccino*, 53 AD2d 965, 386 NYS2d 111, 112). If the Division is unable to meet this burden, the statutory time limit to file a petition is in effect tolled and the petition will be deemed timely filed (*Matter of Huang*, Tax Appeals Tribunal, April 27, 1995; *Matter of Fuchs*, Tax Appeals Tribunal, April 20, 1995; *Matter of Katz, supra*).

E. The affidavits of Ms. Mahon and Mr. Baisley contain sufficient proof to establish the standard procedure of the Division for issuing notices of determination (*see, Matter of Roland*, Tax Appeals Tribunal, February 22, 1996). The affidavits show that, as each notice is generated, a certified control number is assigned. In the process, a certified mail record is generated which contains the name and address of the taxpayer to whom the notice was issued, the assessment number of the notice and the certified control number assigned to the notice.

F. The CMR submitted with Ms. Mahon's affidavit illustrates that those procedures were followed in this case. Petitioners' names as listed on the CMR match their names as they appear on the notices of deficiency. The addresses listed on the CMR match that utilized by petitioners on their 1997 Nonresident and Part-Year Resident Income Tax Return. The date of the Postal Service postmark on the CMR indicates that the notices were mailed on September 8, 1998. The CMR indicates that there were 163 pieces of mail both listed by the sender and received by the post office. This is corroborated by the initials of the receiving postal employee and also by the fact that 163 certified control numbers are listed on the CMR.

G. The Tax Appeals Tribunal has held that evidence of general mailing procedures together with a properly completed CMR is sufficient to prove mailing (*Matter of Katz, supra*). Since in the present matter there is both evidence of general mailing procedures and a properly completed CMR, the Division is entitled to the presumption of proper mailing and it is determined that the notices were issued and mailed to petitioners on September 8, 1998.

H. The final question is whether petitioners timely filed their Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services. Pursuant to Tax Law § 170(3-a)(a),(b) and § 689(b), petitioners had 90 days from the mailing of the notices of deficiency to file a request for a conciliation conference with BCMS. Here, it is clear that the request was filed well beyond the statutory deadline. There being no timely petition, the petition must be dismissed because the Division of Tax Appeals is without jurisdiction to review the substantive arguments presented (*Matter of Fresina*, Tax Appeals Tribunal, January 30, 1997).

I. The petition of Winston and Phyllis Fraser is dismissed.

DATED: Troy, New York  
June 29, 2000

/s/ Arthur S. Bray  
ADMINISTRATIVE LAW JUDGE